UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES N. MABONGA,

Plaintiff,

v.

UNIVERSITY MEDICAL CENTER, *et al.*,

Defendants.

Case No. 2:08-CV-00688-KJD-LRL

ORDER

Presently before the Court is Defendants' Motion to Dismiss (#71). Plaintiff filed a response in opposition (#76/77) to which Defendants replied (#78).

I. Background

Plaintiff brought the present complaint (#3) on July 21, 2008 under 42 U.S.C. § 1983. Plaintiff alleges that Defendants discriminated against him in violation of the Americans with Disabilities Act of 1990 ("ADA"), §202, 42 U.S.C. §12132 and the Rehabilitation Act ("RA") of 1973, 29 U.S.C. § 794a.

The essential allegations of Plaintiff's *pro se* complaint, which the Court construes liberally as it must, are that on January 3, 2008, Plaintiff tried to see his physician at UMC Wellness Center ("the Center") , without an appointment, for treatment related to a reaction to prescribed medication.

Plaintiff alleges that he was denied treatment by Defendant Gary Gray and the Center because he had an "inability to pay." Plaintiff also alleges that he is disabled by diabetes and a "depressed immune system." Plaintiff does not dispute that his insurance cards had expired and that he was directed to visit the Social Security office, the Welfare office and Clark County Social Services to renew his cards. Plaintiff filed a complaint with the clinical director, Leslie O'Brien, who did not respond. Plaintiff alleges that he was hospitalized from January 6, 2008 through January 8, 2008, due to the symptoms he complained of on January 3, 2008.

II. Analysis

Plaintiff asserts that Gray and the Center violated his rights under the ADA and the RA when it denied him treatment based on either his inability to pay or his disability. Generally speaking, the Court may treat the claim for inability to pay as discrimination based on his disability because Plaintiff alleges that his inability to pay is a direct result of his disability. See generally, U.S. Airways v. Barnett, 535 U.S. 391, 413 (2002); Giebeler v. M & B Assocs., 343 F.3d 1143, 1150-51 (9th Cir. 2003). To prove that a public service or program violates Title II of the ADA, a plaintiff must show "(1) he is a 'qualified individual with a disability'; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability." Townsend v. Quasim, 328 F.3d 511, 516 (9th Cir. 2003)(quoting Duvall v. County of Kitsap, 260 F.3d 1124, 1135 (9th Cir. 2001)).

Furthermore, "[w]hen a state's policies discriminate against the disabled in violation of the ADA, the ADA's regulations mandate reasonable modifications to those policies in order to avoid discrimination on the basis of disability, at least when such modification would not fundamentally alter the nature of the services provided by the state." Townsend, 260 F.3d at 517 (citing Lovell v. Chandler, 303 F.3d 1039, 1054 (9th Cir. 2002); Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996)). Discussing the ADA, under different factual circumstances, the Supreme Court counseled "that states must be able to take financial burdens into account in administering programs affecting the disabled

and must enjoy a certain measure of leeway 'to administer services with an even hand' among its citizenry." Townsend, 260 F.3d at 520 (quoting Olmstead v. L.C., 527 U.S. 581, 604-5 (1999)).

Similarly, Section 504 of the Rehabilitation Act requires the plaintiff to demonstrate that: (1) plaintiff is a qualified individual with a disability; (2) plaintiff was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; (3) such exclusion, denial of benefits, or discrimination was by reason of his disability; and (4) the program receives federal financial assistance. See 29 U.S.C. § 794; Bonner v. Lewis, 857 F.2d 559, 562-63 (9th Cir. 1988).

The Center provides primary care services for individuals with HIV/AIDS. The Center also assists individuals with limited means procure eligibility for social welfare programs, including coverage under the Ryan White Comprehensive AIDS Resources Emergency Act of 1990 ("the CARE Act"), 42 U.S.C. § 300ff *et. seq.*, as amended. The CARE Act provides assistance for individuals who do not have sufficient health insurance coverage. It fills in the gaps where other sources do not provide coverage. Section 2617(b)(6)(F) of the CARE Act requires grantees, such as the Center, to ensure that:

> ". . . grant funds are not utilized to make payments for any item or service to the extent that payment has been made, or can reasonably be expected to be made, with respect to that item or service – (I) under any State compensation program, under an insurance policy, or under any Federal or State health benefits program."

Thus, the question on Defendants' motion to dismiss becomes whether requiring Plaintiff to have some form of payment in order to receive services at the Center violates the ADA or RA.

Plaintiff was eligible for and participated in the Ryan White CARE Act Part B Program which provides funding for prescription drug assistance. However, Part B funds are not utilized for primary medical services. In order to receive funding for primary medical services, Plaintiff was required to establish eligibility for the Part C program. However, because he had been eligible for and receiving insurance benefits from State and Federal health benefits programs, Plaintiff was not eligible for Part

C funds. Plaintiff's failure to update and renew his Federal and State primary medical benefits was the cause of the Center's alleged decision to deny him treatment.

The Center acted appropriately within the confines of the ADA and RA when it decided that patients that had Federal and State resources available to pay for primary health benefits were required to use them. Failure to follow the requirements of the CARE Act would result in the Center losing funding under the Act and would deplete the resources the Center had for treating other patients that did not have alternative funding available for primary health care. The Center appropriately considered the requirements of the CARE Act and its financial resources in denying care to Plaintiff. Accordingly, the Court must grant Defendants' Motion to Dismiss the ADA and RA claims.

Plaintiff also alleges a claim under 42 U.S.C. § 1983. A section 1983 individual capacity claim seeks to hold a state officer liable for actions he takes under color of state law. See Kentucky v. Graham, 473 U.S. 159, 165 (1985). Section 1983 is not itself a source of substantive rights, but merely the procedural vehicle by which to vindicate federal rights elsewhere conferred. See Albright v. Oliver, 510 U.S. 266, 273 (1994). To make a prima facie case under § 1983, a plaintiff must show that the defendant: (1) acted under color of state law, and (2) deprived the plaintiff of a federal or constitutional right. See Borunda v. Richmond, 885 F.2d 1384, 1391 (9th Cir. 1988). However, since Plaintiff has failed to establish that he was deprived of a federal or constitutional right, the Court must also dismiss his claims based upon section 1983.

III. Conclusion

Accordingly, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (#71) is **GRANTED**;

///

///

///

///

IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendants and against Plaintiff.

DATED this 22nd day of February 2011.

Kent J. Dawson
United States District Judge